

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 248 OF 2023

Vinod Mahadev Bakkam

...Appellant

Versus

Subhash Sudam Koyande (Deceased)  
Through Shital Subhash Koyande

...Respondent

...  
Mr. Shishir S. Manjrekar, for Appellant.  
Mr. Prakash Sutar, for Respondent.

...

CORAM : SANDEEP V. MARNE, J.

DATE : AUGUST 25, 2023.

P.C.:

1. By this Appeal, Appellant challenges order dated 14 November 2022 passed by the City Civil Court allowing Notice of Motion No.682 of 2022 filed by the Defendant for setting aside exparte decree dated 11 January 2017.

2. Appellant-Plaintiff had instituted Summary Suit No.1360 of 2014 for recovery of amount of Rs.2,50,000/- with interest at the rate of 18% p.a. The Suit Summons were issued and bailiff and clerk in the office of Sheriff of Bombay filed an affidavit dated 24 December 2015 of service of suit summons on the Defendant. The rojnama indicates that three different Advocates

appeared on behalf of the Defendant on different dates without filing any Vakalatnama. The City Civil Court proceeded to decree the Suit on 11 January 2017, in absence of any defence on the part of the Appellant.

3. Defendant filed Notice of Motion No.682 of 2022 for setting aside the *exparte* decree by condoning the delay. The stand taken by the Defendant in her motion was that she never received Suit Summons and was not aware about filling of the Suit by Appellant-Plaintiff. That she acquired notice of filing of Suit only after receipt of notice in the Execution Application dated 11 December 2022. By the order impugned in the present Appeal, the City Civil Court has proceeded to allow the Notice of Motion No.682 of 2022 and has set aside the *exparte* decree on imposition of the cost of Rs.5,000/- on the Defendant.

4. The learned Counsel for the Appellant would submit that the Suit Summons were duly served on the Defendant which is apparent from the Affidavit of the Bailiff. That Defendant engaged three different Advocates, who appeared in the Suit but did not file their Vakalatnama. He would take me through the rojnama of the Suit to indicate that as to how three different Advocates appeared on behalf of the Defendant. He would further submit that once the Suit Summons was served, Defendant was required to make out

a sufficient cause for non appearance. He would further submit that the City Civil Court has erroneously considered Defendant's application under the provisions of order IX Rule 30 when in fact the suit being a Summary Suit, the provisions of Order XXXVII Rule 4 are attracted. That the Notice of Motion was filed by the Defendant only to protract the proceedings, who was always aware about filing of the Suit.

5. Per contra the learned Advocate appearing for Respondent-Defendant would oppose the Appeal and support the order passed by the Trial Court. He would assert that the Defendant never received suit summons and that the signature obtained by the Bailiff on the service report is not that of the Defendant. That Defendant never engaged any Advocate to represent her. That the rojnama does not reflect the correct factual position about appearances of three Advocates on the part of the Defendant. That though rojnama shows tendering of a Notice of Motion by one of the Advocates, there is absolutely no record of such motion being tendered. That on receipt of Suit Summons in Summary Suit, the Defendant or his Advocate is required to file Memo of appearance. In the present case none of the three Advocates had filed their Memo of appearance and therefore mere reflection of erroneous rojnama would not be a ground for holding that the Defendant was aware

about filing of the Suit. He would pray for dismissal of the suit.

6. After considering the rival contentions canvassed by the parties, the core issue involved in the present case is where the Defendant indeed received suit summons. I have gone through the Affidavit of service sworn by the Bailiff and Court Officer/Clerk which records as under :-

### **AFFIDAVIT OF SERVICE**

“We Satish M. Khopatkar, Indian Inhabitant, bailiff and clerk Sheriff of Bombay High Court, Bombay and Vinod Mahadev Bakkam, Indian inhabitant, plaintiff having their office at Ground floor, City Civil Court, Fort, Mumbai-400 001, do hereby solemnly affirm and state as under:

1. I Satish M. Khoptkar for myself say that pursuant to direction given by this Hon’ble Court. I accompanied by co-deponent Mr. Vinod Bakkam attended the office of defendant of her shop on 30/10/2015 at shop No. 6, Galaxy Shop, Topaz Bldg, Bhakti Park, Wadala, Mumbai – 37 to served upon her Writ of Summons along with copy of above plaint as and by way service upon her. On pointing out by Co-deponent, towards the defendant, I served the Writ of Summons on Defendant by showing to her the original Writ of Summons and delivering to and leaving with her the duplicate copy of Writ of Summons.
2. We say that the defendant had duly accepted Service of Writ of Summons has been duly signed by her. Hereto annexed and marked “Exh 1” is the copy of Service Report.
3. We say that the writ of summons and copy of Plaint has been duly served upon the defendant.
4. We say that whatever has been stated in the abovementioned paragraphs is true and correct to the best of my knowledge and believe it to be true.”

7. Perusal of the Suit Summons would indicate that the Summons

reflected the address stated in the cause title of a plaint. The Notice of Motion filed by the Defendant does not contain any assertion to the effect that the Defendant does not carry on business/reside at the address given in the plaint. I therefore do not see any reason to disbelieve statement made by the Bailiff, being officer of the Court, to the effect that he met Defendant at Shop No.6, Galaxy Shop, Topaz Building, Bhakti Park, Wadala, Mumbai-37 and delivered Suit Summons. The presumption of service of Suit Summons can also be drawn on the basis of rojnama drawn by the Court. After service of summons it appears that, one Advocate Swati Bawal appeared on behalf of the Defendant on 1 February 2016 and filed draft Notice of Motion and sought leave to register the same. Appearance by an Advocate on behalf of Defendant immediately after service of Suit Summons cannot be a coincidence. It indicates that the suit summons was received by her. However, said Advocate neither registered the Notice of Motion nor filed her Vakalatnama. Later Advocate Suraj Gaikwad appeared on behalf of Defendant on 8 December 2016 and prayed for time to file Notice of Motion for setting aside order dated 23 November 2016. However again the said Advocate failed to appear on subsequent dates of hearing nor filed his Vakalatnama. On 11 January 2017 i.e. the date fixed for Judgment, Advocate Swati Sawant appeared on behalf of

Defendant submitting that the Notice of Motion for restoration was yet to be tendered and before tendering, the same it was wrongly dismissed.

8. Filing of Affidavit of Service by the Bailiff coupled with rojnama showing appearances of three Advocates would clearly raise a presumption that the Defendant was fully aware of filing of Suit by the Plaintiff.

9. Defendant is the wife of late Subhash Sudam Koyande. It is the Plaintiff's case that the Plaintiff had advanced sum of Rs.2,50,000/- to Defendant's Advocate and the suit is filed for recovery of the said amount. The Defendant denies payment of such amount to her husband.

10. Considering the fact the Defendant was served with Suit Summons and that she engaged three Advocates on different dates to represent her in suit, ordinarily the City Civil Court would not be justified in setting aside the exparte decree after expiry of long delay. However, considering the fact that the amount is shown to have been advanced to Defendant's husband, who is no more, an opportunity is required to be given to the Defendant to prove her defence. Therefore, while not disturbing the order passed by the trial Court I am of the view that, cost of Rs.5,000/- imposed by the City Civil Court as a pre-condition for setting aside the exparte Decree is too meager.

For the conduct exhibited by the Defendant, she is required to be saddled with exemplary costs.

11. The present Appeal is accordingly disposed of with a modification to the order dated 14 November 2022 passed by the City Civil Court. It is modified to the extent that the Defendant shall pay to the Appellant/Plaintiff cost of Rs.25,000/- as a pre-condition for setting aside the exparte Judgment and Decree dated 11 January 2017.

12. If the Defendant has already paid cost of Rs.5,000/- as directed in the order dated 14 November 2022, the balance amount of cost be paid to the Appellant-Plaintiff within a period of four weeks from today.

13. Needless to observe that, if the Defendant fails to pay enhanced amount of costs, the exparte Decree dated 11 January 2017 shall revive. With the above observations, the Appeal is disposed of.

14. Considering the fact that the Suit is being revived at the instance of the Defendant, who has been careless in defending the suit, the trial Court is requested to expedite the hearing of the Suit and to make an endeavour to dispose of the same expeditiously as possible.

**(SANDEEP V. MARNE, J.)**